

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NOS. 16-81 and 20-81:

KESSLER ASSOCIATION OF TEACHERS,
MEA,

Complainant,

- vs -

LEWIS AND CLARK SCHOOL
DISTRICT NO. 2,

Defendant.

FINAL ORDER

No exceptions having been filed, pursuant to ARM 24.26.215,
to the Findings of Fact, Conclusions of Law and Recommended
Order issued on February 22, 1982, by Hearing Examiner Linda
Skarr;

THEREFORE, this Board adopts that Recommended Order in this
matter as its FINAL ORDER.

DATED this 24 day of April, 1982.

BOARD OF PERSONNEL APPEALS

By John Kelly Addy
John Kelly Addy
Chairman

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy
of this document was mailed to the following on the 5th day
of May, 1982:

Duane Johnson
P.O. Box 781
Helena, MT 59624

HILLEY & LORING, P.C.
Executive Plaza, Suite 20
121 4th Street North
Great Falls, MT 59401

Joseph Jacobson

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGES
#16-81 and #20-81

KESSLER ASSOCIATION OF TEACHERS, MEA)	FINDINGS OF FACT; CONCLUSIONS OF LAW; RECOMMENDED ORDER
Complainant,)	
vs.)	
LEWIS AND CLARK SCHOOL DISTRICT #2)	
Defendant.)	

For the purpose of hearing and decision Unfair Labor Practice Charges #16-81 and #20-81 were combined.

The hearing on these charges was held on September 15, 1981 under the authority of Section 39-31-405 MCA and in accordance with the Administrative Procedures Act (Title 2, Chapter 4, MCA).

ULP #16-81

THE CHARGE

On April 22, 1981 the Board of Personnel Appeals received a complaint from the Kessler Association of Teachers, MEA, alleging violation of Section 39-31-401(5) MCA, viz. the Board of Trustees made a salary proposal during the 1981-82 negotiations which listed, by individual names and positions, the sixteen teachers in the bargaining unit and the proposed salary each would receive. Both parties ratified the subsequent agreement. The District mill levy passed and there is money to fund the negotiated salaries. Complainant charges that on or about March 15, 1981 defendant announced that it was discontinuing its art, music and physical education programs. This would involve the lay-off of four teachers who had each been listed on the ratified salary proposals.

1 Defendant denied that failure to implement the salary
2 schedule for all 16 teachers was an unfair labor practice
3 because the proposal during bargaining was merely to illustrate
4 how current staff would be affected by the Board proposal
5 and was not a commitment to retain specific programs or
6 staff members.

7 ULP #20-81

8 THE CHARGE

9 On May 18, 1981, Complainant filed charges alleging
10 that Defendant violated Sec. 39-31-401(4) by issuing a
11 memorandum in retaliation for the charges filed in ULP
12 #16-81. This memorandum, issued by Principal C.P. Garrett
13 announced unilateral changes in working conditions which had
14 not been bargained with the Association and was, therefore,
15 a violation of Sec. 39-31-401(5) which requires good faith
16 bargaining on wages, hours and working conditions. The
17 Association further alleges that the tone of the memorandum
18 was clearly threatening and interferes with and restrains
19 employees in the exercise of their protected rights in
20 violation of Sec. 39-31-401(1). In addition, the Associa-
21 tion charges that Principal Garrett refused to meet with a
22 faculty member concerning allegations which he had made
23 against her because she had a union representative with her.
24 This refusal to permit the union representative to be present
25 is a further infringement on the protected rights of employees
26 in violation of Section 39-31-401(1).

27 FINDINGS OF FACT

28 (ULP 16-18)

29 1. The teachers and the Kessler School Board began
30 bargaining for the 1981-1982 contract in January of 1981.
31 The association bargaining team was composed of Beth Blackman
32 (spokesperson), Robert Saindon, Sherree Janson, Rita Bertleson

1 and Leon Storms. The full Board sat at the table along with
2 the principal who was not a member of the team.

3 Concerned with the total "line item" cost of negotiations,
4 the Board wanted to negotiate in packages of all money items
5 rather than negotiate on money items taken one at a time.
6 In the Kessler school district, it has been the practice for
7 the two parties to "cost out" the proposals usually presenting
8 a sheet listing individual teachers and proposed salaries
9 and benefits. To this end the teachers asked how many they
10 were negotiating for. The reply was "all of them". At that
11 time there were 16 teachers in the district who were being
12 paid out of the general fund budget.

13 Proposals from the Board listing the base pay, the MEA
14 index level, each teachers name, the 1980-81 salary and
15 medical insurance, the proposed salary, the proposed medical
16 insurance, the amount of the proposed increase and the
17 proposed increase in percent. Further, these proposals
18 listed the Board's costs for personal leave and totals for
19 all money items. At the bottom it was stated "This is a
20 package proposal. If any part or section is rejected, or
21 changed, the Board of Trustees reserves the right to withdraw
22 the entire package."

23 Tentative agreement was reached the night of March 2,
24 1981. Four items were "signed off". Listed on individual
25 pages were the tentative agreements on salary, medical
26 insurance, personal leave and advance pay. Each page is
27 signed by Frank Schatz, Chairman of the Board of Trustees
28 and by Beth Blackman, spokesperson for the teachers. The
29 sheet covering salary specifies that "the salary is based on
30 an MEA index level of 4 with a base of 12,340." It does not
31 list either the number of teachers nor does it list teachers
32 by name. Attached to these four pages as part of Complainant's

1 exhibit #1 is an explanatory page which was made sometime
2 after the tentative agreement was reached. This page is
3 similar to the proposals made by the Board listing the 16
4 teachers individually. It is not signed. The resultant
5 contract (1981-82) does not list either the staffing level
6 (number of teachers) or the teachers by name. Instead it
7 contains a standard MEA level 4 matrix with a base salary of
8 \$12,340. The 1980-81 contract contains a similar matrix
9 with no mention of staffing levels or individual teachers.

10 At the March 17 School Board meeting Principal Garrett
11 presented the Board with information on the declining student
12 enrollment and consequent reduction in funds to operate the
13 district. He recommended that several programs be cut and
14 the teachers laid off. The Board accepted his recommendations
15 and the teachers were notified; Sherree Janson and Robert
16 Saindon were subsequently laid off. Ms. Janson taught P.E.
17 and Music and Mr. Saindon was the least senior teacher at
18 the school. In addition, one teacher retired and one did
19 not return.

20 2. The memorandum issued by Principal Garrett on
21 April 24, 1981 was not issued in retaliation for the Association
22 filing the charge in ULP 16-81. On April 22, 1981, Complainant
23 filed the charge in ULP 16-81 with this Board. The summons,
24 dated April 24, 1981, was sent by certified mail. The
25 return receipt stamped by the United States Postal Service
26 testifies to the fact that the summons was not received at
27 the home of the Chairman of the Board until April 25, 1981,
28 one day after Principal Garrett issued his memorandum.

29 3. On April 24, 1981, Principal C.F. Garrett of the
30 Kessler School issued a memorandum to all staff members. In
31 this memo he expressed his displeasure at the way things
32 were going at Kessler School. Mr. Garrett's memo had three

1 instructions for the teachers. Teachers were directed to 1)
2 read section 1.24 through Section 1.42 of the school district
3 policies paying special attention to Section 1.24, Duties,
4 Conduct and Responsibilities of Instructional Personnel, 2)
5 complete a temporary absence request form if they were going
6 to leave the building between the hours of 8 a.m. and 3:45
7 p.m. (a copy of the form was attached), 3) get administrative
8 approval of all bulletins to be sent home with students.

9 The memo continued:

- 10 4) When deviation/s are observed by the Administration,
11 three copies of those deviation/s will be made,
12 with notification to you and a copy placed in your
13 personnel file, as well as a copy sent to the
14 Board of Trustees. Attached is a copy of the
deviation form to be used in the future. This
form will be used to constructively improve the
deviation and maintain the educational program at
Kessler.

15 The memo exhorted the teachers that "The seriousness of this
16 matter is not to be taken lightly" and "In closing, if you
17 see this as threatening, and not as a mutual endeavor to
18 make Kessler a better school, I question whether you should
19 be teaching the children in our District."

20 4. There were two changes in work rules specified in
21 Principal Garrett's memorandum. They were 1) bulletins sent
22 home with students now had to have prior approval and 2) the
23 temporary absence request form was new.

24 Prior to February, 1981, teachers wishing to leave the
25 school sought out Mr. Garrett and made a verbal request and
26 received verbal permission to leave. This policy was changed
27 in February 1981 at the request of the teachers who sometimes
28 found it difficult to locate the principal. The new system
29 instituted in February was a sign-out sheet in the form of a
30 spiral notebook located in the school office. Teachers
31 wishing to leave the building noted the time and signed the
32 sheet. On their return they either crossed out or erased

1 their names. Apparently, there was no penalty for neglecting
2 to use this procedure.

3 The system instituted and described in the April 24
4 memo was a written request form on which the teacher had to
5 specify the reason for the absence. This request form had
6 to be approved either by Mr. Garrett or the assistant principal
7 who was a classroom teacher.

8 Principal Garrett had two main reasons for instituting
9 the written absence request form. Primarily he hoped that
10 by changing the procedure he would discourage teachers from
11 leaving the building at lunch time.¹ He felt they were
12 abusing this privilege. The check-out procedure was to be
13 used for any absence from the building so that, if a parent
14 called, Garrett would know that a teacher was or was not in
15 the building.

16 Mr. Garrett wished to review bulletins being sent home
17 with students so that he could correct spelling and grammatical
18 errors.

19 5. In addition to the changes in work rules described
20 in finding of fact number 4, Principal Garrett's April 24
21 memo imposed discipline for violation of these rules and for
22 violation of existing school board policies covering the
23 duties, conduct and responsibilities of instructional personnel.
24 It appears that, prior to the April 24 memo, there was no
25 penalty prescribed for violation of board policies or other
26 work rules.

27 As specified in finding of fact number 3, the penalty
28 imposed by Garrett was that of notifying the Board of Trustees

29
30 ¹ It should be noted that there is no mention of a lunch
31 period in the teachers contract nor are there hot lunch
32 facilities at the school. Only two teachers at a time
are on duty during the lunch hour. They are assisted
by teacher aides. The other teachers have no duties
during the lunch hour.

1 of "deviations" from policy or work rules and placing a copy
2 of his notation in the teacher's personnel file. Teachers
3 would also receive a copy of his notation of "deviation".

4 Apparently, teachers were to discover their "deviation"
5 at the same time the Board was notified. There is no contract
6 procedure under which they could defend themselves against
7 Garrett's allegations.

8 6. On February 23, 1981, shortly before the tentative
9 agreement was reached, spokesperson Beth Blackman was evaluated
10 by Principal Garrett. At the conclusion of the class period
11 in which the evaluation took place, Ms. Blackman told Mr.
12 Garrett that she wanted to reply in writing to some of his
13 criticism before she signed the evaluation form.

14 Ms. Blackman had still not submitted her written comments
15 when on April 24, she received two letters with her pay
16 check. The first was the memo to all staff discussed in
17 finding of fact number 3. The second was a letter which was
18 threatening in tone. Garrett began this letter by saying,
19 "Because of the seriousness of the following letter and the
20 concerns of some recent events, I'm placing a copy of this
21 letter in your personnel file." A copy was also sent to the
22 Board of Trustees. The letter charges that Ms. Blackman
23 refused to sign her evaluation and noted that she still had
24 not done so. It continues saying that "As noted on your
25 evaluation, I was concerned about Section 1.24, numbers 5, 8
26 and 14 [Board Policies]; also lesson plans and classroom
27 appearance." Paragraph three demands an explanation of why
28 she "tampered (erased) names from the check out tablet on
29 April 21 and 22. Mr. Garrett continued requesting that she
30 meet with him to discuss:
31

- 32 1. Your evaluation dated February 23, 1981

2. Clarification and explanation of erasures on the check-out tablet
3. What positive efforts you will initiate to correct these deviations and comply with the Policies, Rules and Regulations of District No. 2.

Ms. Blackman made an appointment with Principal Garrett for May 4.

7. On May 4, when Ms. Blackman appeared to keep her appointment with Principal Garrett she was accompanied by a union representative--Larry Diebold of the Montana Education Association. Principal Garrett refused to go forward with the interview in Diebold's presence. He told Ms. Blackman that he would talk to her later on a one to one basis.

Later the same day Garrett hand wrote a conciliatory letter to Ms. Blackman which she never received. In this letter Garrett spoke only of her evaluation. He did not suggest that he would meet with her and a union representative.

On May 12, Ms. Blackman wrote a letter to the Board of Trustees who had received a copy of Garrett's letter of April 24. In her letter she defended herself against Garrett's charges and requested that his letter be removed from her personnel file and that he write a letter of apology.

On May 16, the Association filed the charge in this matter.

At some time during this period the Board of Trustees discussed the situation but took "no particular action".

On June 4, 1961 Principal Garrett, as a representative of the Board, wrote to Ms. Blackman suggesting that they meet at 10 a.m. on either June 15 or June 19. The letter assured her that she should feel free to have an MEA representative with her. The letter concluded by asking her to confirm the time and date for the meeting. June 4, was the last day of school and Ms. Blackman was unable to locate Mr. Garrett

1 to confirm the appointment. Ms. Blackman was out of town in
2 the interim but returned in time for the appointment on June
3 15. Ms. Blackman appeared for the meeting without a union
4 representative. In case the meeting was not continued she
5 took with her a letter for Mr. Garrett suggesting that the
6 matter be handled in writing. The letter also implied that
7 she would drop the unfair labor practice charge if Garrett's
8 letter was removed from her file and if he wrote a letter of
9 apology. Ms. Blackman gave Mr. Garrett this letter when he
10 refused to meet with her because a representative of the
11 Montana School Boards Association was not there. There the
12 matter rests.

13 ULP 16-81

14 DISCUSSION

15 The teachers contend that the Board of Trustees failed
16 to implement the ratified agreement for 16 teachers and thus
17 bargained in bad faith and are in violation of Section
18 39-31-401(5) MCA. This contention raises the question of
19 what the agreement actually was. Evidence on the record
20 indicates that listing the teachers in the proposals has
21 been standard practice in this small school district for
22 several years. Both sides benefit from such an approach,
23 the teachers know their proposed salary and benefits and the
24 Board knows the projected financial impact. The form of the
25 tentative agreement that was reached and signed off on the
26 night of March 2, 1981 is telling evidence that the lists of
27 names and salaries were intended to be informational. The
28 tentative agreement includes neither individual names nor
29 does it include the number of teachers. The resulting
30 agreement that was signed does not list individual teachers
31 or salaries but merely lists a base salary and an index
32 level. There is no evidence that listing teachers on the

1 proposal was more than informational. The charge is not
2 proven.

3 CONCLUSION OF LAW

4 The Board of Trustees of Lewis and Clark School District
5 #2 is not in violation of Section 39-31-401(5) MCA.

6 RECOMMENDED ORDER

7 The charge in ULP 16-81 is hereby dismissed.

8 ULP 20-81

9 DISCUSSION

10 COUNT 1

11 The Association charges that the memo issued by Principal
12 Garrett was threatening in tone and instituted changes in
13 working conditions which should have been bargained instead
14 of being imposed unilaterally. The school district maintains
15 that the changes in working conditions set forth in the
16 April 24 memo were not material, substantial and significant
17 changes, were in the realm of management rights, and therefore
18 did not need to be bargained.

19 The April 24 memo changed work rules relating to absence
20 from the school and bulletins from teachers to parents. In
21 addition, it imposed a system of discipline for "deviation"
22 from these new rules as well as imposing discipline for
23 violation of school board policies. Apparently, no system
24 of discipline was attached to work rules or Board policies
25 before the April 24 memo. After this memo if Principal Garrett
26 observed teachers deviating from these rules he would note
27 the deviation, send the teacher and the School Board a
28 written memo and place a copy of the memo in the teacher's
29 personnel file. Teachers have no contractual grievance
30 procedure by which they may defend themselves against allegations
31 by the principal.

32 The School Board argues that the changes in working

1 conditions are not material, substantial or significant--a
2 standard set forth by the NLRB in Weather Tech. Corporation,
3 238 NLRB No. 210, 99 LRM 1709 (1978). Further, they correctly
4 argue that the school district has the right to administer
5 the programs or policies of the district. However, in
6 making this argument they have not considered that discipline
7 is a mandatory subject of bargaining and must be bargained
8 with a union. Specifically, in Electri-Flex¹ and Anoco² the
9 NLRB held that by replacing an oral discipline system with a
10 written notice system the employer instituted a new system
11 of discipline and this new system is a mandatory subject of
12 bargaining. In Electri-Flex the employer had contended that
13 the mode of discipline was within the area of management
14 prerogative. The NLRB said "While it is true that the Act
15 does not take from the employer the right to enforce reasonable
16 rules for the conduct of business and to take disciplinary
17 action against employees who either violate the rules or are
18 generally not suitable for efficient production [cite omitted],
19 it is equally true that the institution of a new system of
20 discipline is a significant change in working conditions,
21 and thus is one of the mandatory subjects of bargaining...
22 included within the phrase 'other terms and conditions of
23 employment'." In Anoco the NLRB said "Changing from oral
24 reprimand to written warnings is, in our opinion, a change
25 which significantly affects the employees' working conditions."
26 In upholding the NLRB, the court said, "Moreover, the change
27 was correctly classified by the Board as involving a mandatory
28 subject of collective bargaining. Under the new system, the
29 employer's complaints tended to become a permanent part of
30

31 1 Electri-Flex Co. v. NLRB, 578 F.2d 1327, C.A. 7, (1978);
32 97 LRM 2888, cert. den. 439 U.S. 911 (1978) 99 LRM
2743.

2 Anoco Chemicals Corp., 211 NLRB No. 84, 86 LRM 1463 (1974);
enf. in part CA 5 (1976), 91 LRM 2837, 529 F.2d 427.

1 an employee's personnel file which could affect his future
2 job security. This court has recognized that internal plant
3 rules and the enforcement procedures associated with such
4 rules often fall within the scope of mandatory bargaining."
5 The next year the 5th circuit court upheld the NLRB in a
6 similar case where the employer unsuccessfully attempted to
7 get the Board to reconsider its established view in this
8 type of case.¹

9 In Peerless Publications² and Capital Times Co.³, the
10 NLRB found that particular work rules imposed by the employer
11 were not violations of the Act but that the disciplinary
12 system attached to the work rules was a mandatory subject of
13 bargaining and hence the employer was in violation of the
14 Act.

15 In this case we find that the employer unilaterally
16 imposed new work rules and a new system of discipline on the
17 teachers. A disciplinary system is a mandatory subject and
18 must be bargained. It is unnecessary to make a determination
19 of whether the imposition of the particular work rules is a
20 violation of the Act.

21 COUNT II

22 As shown in finding of fact #2, Principal Garret issued
23 his April 24 memorandum the day before the summons in ULP
24 #16-81 was received at the home of the Chairman of the
25 Board. Therefore, it is impossible to believe that his
26 memorandum was issued in retaliation for the Association
27 filing the charge in ULP #16-81.

28
29 1 Boland Marine & Mfg. Co., 225 NLRB No. 113, 93 LRM
30 1346 (1976), aff'd. CA 5, 96 LRM 3239, 562 F2d 1259.

31 2 Peerless Publications, 231 NLRB No. 15, 95 LRM 1611
(1977)

32 3 The Capital Times Co., Madison, Wisc. and Newspaper Guild
of Madison, Local 64 223 NLRB No. 87, 91 LRM 1481
(1976)

COUNT III

In 1975, the United States Supreme Court agreed with the NLRB and reversed the fifth circuit court establishing what has come to be known as the Weingarten rule.¹ The Court agreed with the NLRB that employee insistence upon union representation at an employer's investigatory interview, which the employee reasonably believes might result in disciplinary action against him, is protected concerted activity. Thus, the employer was in violation of the LMRA. Applying the Weingarten rule we must decide whether Ms. Blackman's belief that the interview might result in disciplinary action was reasonable. For guidance we can turn to findings of fact #3 and 6. First we find that on April 24, Ms. Blackman received two letters with her paycheck. The first was the letter to all staff which unilaterally imposed discipline for violation of the two new work rules and school board policies. The overall tone of the letter was threatening. In addition to this letter, Ms. Blackman received one which started, "Because of the seriousness of the following letter and the concerns of some recent events, I'm placing a copy of this letter in your personnel file." Further, he sent a copy to the Board of Trustees. The letter also demanded an explanation of why she "tampered (erased) names from the check out tablets." In addition to the names on the check out tablet, Garrett wanted to talk about her evaluation and what efforts she would initiate to correct these deviations and comply with the policies, rules and regulations of the district. The conclusion is inescapable that the purpose of the meeting was much broader than a

¹ NLRB v. Weingarten, 420 U.S. 251 (1975), 88 LRRM 2689; see also ILGWU v. Quality Mfg. Co. decided the same day, 88 LRRM 2698.

1 simple follow-up of the February evaluation as respondent
2 claims. Inescapably, we must arrive at the conclusion that
3 any employee receiving these letters would fear that the
4 requested interview might result in disciplinary action.
5 The Board of Trustees is in violation of 39-31-401(1).

6 CONCLUSIONS OF LAW, ULP 28-81

7 COUNT I

8 The Board of Trustees of Lewis and Clark School District
9 #2 has violated Section 39-31-401(1) and (5), MCA and by so
10 doing has restrained its employees in the exercise of their
11 rights guaranteed in 39-31-201, MCA.

12 COUNT II

13 The Board of Trustees in Lewis and Clark School District
14 #2 did not violate Section 39-31-401(4) MCA.

15 COUNT III

16 The Board of Trustees of Lewis and Clark School District
17 #2 has violated Section 39-31-401(1), MCA.

18 RECOMMENDED ORDER

19 The Board of Trustees of Lewis and Clark School District
20 #2 is directed to:

- 21 1. Withdraw the administrative memorandum promulgated
22 by Principal C.P. Garrett on April 24, 1981.
- 23 2. Remove any reports of "deviations" which have been
24 placed in teachers' personnel files.
- 25 3. Destroy any reports of "deviations" received by
26 them.
- 27 4. Report to the Board of Personnel Appeals by
28 March 10, 1982 that the directives in numbers 1
29 through 3 have been carried out.
- 30 5. Bargain in good faith with complainant on any
31 proposed changes in wages, hours or working conditions.
32

- 1 6. Cease and desist refusing to permit an Association
2 representative to be present at interviews when
3 requested by a teacher who reasonably fears disciplinary
4 action might result.

5 NOTICE

6 Written exceptions may be filed to these Findings of
7 Fact, Conclusions of Law and Recommended Order, within 20
8 days after service thereof. If no exceptions are filed with
9 the Board of Personnel Appeals within that period of time,
10 the Recommended Order shall become the Final Order. Exceptions
11 shall be addressed to the Board of Personnel Appeals, Capitol
12 Station, Helena, Montana 59620.

13 Dated this 22nd day of February, 1982.

14 BOARD OF PERSONNEL APPEALS

15
16 
17 LINDA SKRAK
18 Hearing Examiner

19 CERTIFICATE OF MAILING

20 The undersigned does certify that a true and correct copy
21 of this document was mailed to the following on the 22nd day of
22 February, 1982:

23
24 Hilley & Loring, P.C.
25 121 4th St. North, Suite 2G
Great Falls, MT 59401

MONTANA School Boards Association
501 North Sanders
Helena, MT 59601

26 Frank Schatz, Chairman
27 Lewis and Clark School District #2
28 3290 Country Club Drive
Helena, Montana 59601

29
30 

31 PAD2:J/15